

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP No.11655 of 2006
Date of decision:15.9.2006

M/s Shri Gurudev Photo Color, Chandigarh

....Petitioner

versus

Commissioner of Customs (Import).

Respondent.

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Jagmohan Bansal, Advocate, for the petitioner.
Mr. Anil Kumar Sharma, Advocate, Standing Counsel for UOI.

JUDGMENT:

This petition has been filed for quashing order of recovery under section 142(1) of the Customs Act, 1962 (for short, 'the Act') for which a detention notice dated 30.6.2006, Annexure P.5 has been issued by the Commissioner of Customs (Import) New Custom House, Mumbai.

Case of the petitioner is that on 23.5.1984, it imported Automation Film Developing and Processing machine with microprocessor based system. The petitioner sought clearance of the machine under Open General Licence scheme (OGL). The machine was, however, seized under section 110 of the Act and provisional duty was assessed. On 16.10.1984, the machine was ordered to be confiscated under section 111(d) of the Act but redemption was allowed on payment of fine of Rs.1.50 lacs. Finally, duty was assessed on 31.1.1985 and differential duty was found to be Rs.8,43,341/-. The demand was, however, sought to be enforced vide letter dated 10.4.2006 which was followed by impugned notice, Annexure P.5

Learned counsel for the petitioner contends that since steps

were not taken for recovery of the assessed customs duty for a long period, the authorities were debarred from proceeding to recover the amount of duty after such a long period.

Learned counsel for the revenue submitted that on account of file having got mixed up, steps for recovery were not taken earlier and that mere delay could not debar the authorities from effecting recovery.

Learned counsel for the petitioner relies upon judgment of Bombay High Court in **Parekh Shipping Corporation v. Assistant Collector of Cus., Bombay**, 1995 (80) ELT 781 and judgments of Hon'ble the Supreme Court in **Government of India v. Citedal Fine Pharmaceuticals**, 1989 (42) ELT 515 and **Commissioner of Trade Tax, Lucknow v. Kanhai Ram Thekedar**, 2005 (185) ELT 3.

We are of the view that once duty was due and payable, the authorities could not be debarred from effecting recovery on the ground of delay. No doubt, speedy steps have to be taken for effecting recovery of the government dues but in absence of any statutory provision, the petitioner does not get immunity from payment of dues merely on the ground of delay. In case of such a long delay, plea that file was mixed up, does not appear to be a genuine excuse. This aspect must be looked into and appropriate action taken by the respondent.

The decisions relied upon by the learned counsel for the petitioner relate to assessment/reassessment/initiation of penalty proceedings/demand of interest, having regard to different statutory provisions but do not relate to effecting recovery of the amount due. The said judgments are, thus, distinguishable.

In **M/s Hindustan Times Limited v. Union of India and others**, AIR 1998 SC 688, while considering effect of delay in initiating proceedings for levy of damages under the provisions of the Employees (Provident Fund & Miscellaneous Provisions) Act, 1952, the Hon'ble Supreme Court observed:-

“20. It is true that a principle has been laid down in State of Gujarat v. Patil Raghav Natha, (1969) 2 SCC 187 : (AIR 1969 SC 1297), while dealing with suo motu revisional jurisdiction that though there is no period of limitation prescribed for exercise of that power, still such

a power must be exercised within reasonable time. The said judgment has been applied in matters relating to Section 6 of the Land Acquisition Act in a large number of cases, which were all referred to recently in *Ram Chand v. Union of India*, (1994) 1 SCC 44 : (1993 AIR SCW 3479). In our view, this line of cases cannot ordinarily apply to monies withheld by a defaulter, who holds them in trust.

21. The reason is that while in the above cases decided by this Court the exercise of powers by the authority at a very belated stage was likely to result in the deprivation of property which rightly and lawfully belonged to the person concerned, the position under Section 14-B of the Act of an employer is totally different. The employer who has defaulted in making over the contributions to the Trust Fund hand, on the other hand, the use of monies which did not belong to him at all. Such a situation cannot be compared to the above line of cases which involve prolonged suspense in regard to deprivation of property. In fact, in cases under Section 14-B if the Regional Provident Commissioner had made computations earlier and sent a demand immediately after the amounts fell due, the defaulter would not have been able to use these monies for his own purposes or for his business. In our opinion, it does not lie in the mouth of such a person to say that by reason of delay in the exercise of powers under section 14-B, he has suffered loss. On the other hand, the defaulter has obviously had the benefit of the 'boon of delay' which "is so dear to debtors", as pointed out by the Privy Council in *Nagendranath Dey v. Suresh Chandra Dey*, (1933) ILR 60 Cal 1: (AIR 1932 PC 165). In that case, it was observed that equitable considerations were out of place in matters of limitation and the strict grammatical construction

alone was the guide. Sir Dinshaw Mulla stated:

“ Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court.”

The position of the employer in case of default under Section 14-B is no different.....

28. From the aforesaid decision, the following principles can be summarised. The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14-B. The fact the proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under Section 14-B would be taken; mere delay in initiating action under Section 14-B cannot amount to prejudice inasmuch as the delay on the part of the department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for

charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under Section 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an “irretrievable” nature; he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to “irretrievable” prejudice; further, in such cases of “irretrievable” prejudice, the defaulter must take the necessary pleas in defence in the reply to the show cause notice and must satisfy the concerned authority with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect.

29. In the present case before us, no doubt there is delay of 14 years in initiating action and the damages are levied because of the delay in realisation of the amounts paid by cheque where the amounts were credited into the account of the department beyond the grace period of 5 days. The plea of strike, even assuming it to be relevant, was not proved. The plea of the appellant that the department must be deemed to have dropped the proceedings in 1971 did not also have any legs to stand. There is no plea of any irretrievable prejudice either in the reply to the show cause or in the writ petition.”

The above principles fully apply to present situation. Impugned recovery cannot, thus, be held to be without jurisdiction.

The writ petition is dismissed but we direct the respondent to

take appropriate steps for ascertaining the causes of delay and taking action against those responsible for the same, within four months from the date of receipt of a copy of this order and a report thereof be submitted to this court for perusal.

(Adarsh Kumar Goel)
Judge

Sept. 15, 2006
'gs'

(Rajesh Bindal)
Judge